



July 5, 2000

Mr. Kenneth Stewart
Associate General Counsel
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2000-2519

Dear Mr. Stewart:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136261.

The Texas Department of Transportation (the "department") received a request for any and all information regarding repairs done on the I-20 overpass on Highway 277 in Abilene, including but not limited to accident reports, maintenance records, photographs, estimates, bids, contracts, specifications, daily activity reports, invoices, and payments for repairs. You state that the requestor orally modified the request by limiting the time period to the last ten years and intended to address the May 5, 1998 accident at this overpass.¹ You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative samples of information.²

Section 552.103(a) provides as follows:

¹We note that the submitted information reflects that the accident occurred on May 31, 1998.

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You have submitted an original petition which demonstrates that the department and this office have filed suit against a corporation for damages sustained to the overpass when a truck driver employed by the corporation struck the overpass. Having reviewed the pleading, we conclude that litigation is pending and that the submitted information relates to the pending litigation. Thus, you may withhold most of the submitted information under section 552.103 of the Government Code.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Further, section 552.103 does not authorize the withholding of information which has already been made available to the public. Open Records Decision No. 436 (1986). We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.

However, we note that the majority of the submitted documents must be released pursuant to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not other law that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). The submitted information contains activity reports which we believe are completed reports that must be released under section 552.022(a)(1). Further, the submitted information contains portions of department contracts relating to the expenditure of public funds, as well as related information reflecting the department's accounts receivable, which we believe are public under section 552.022(a)(3). We have placed yellow flags and marked the documents that the department must release.

Some of the documents that must be released pursuant to section 552.022(a) also contain an individual's checking account or credit card number. Section 552.101 of the Government Code protects information coming within the common law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. This office has previously held that an individual's personal financial information may be protected by common law privacy. *See generally* Open Records Decision No. 600 at 9-12 (1992). An individual's bank account and credit card number is information that is highly intimate and of no legitimate interest to the public. *See also* Open Records Decision No. 373 (1983). The department must withhold the bank account and credit card numbers pursuant to section 552.101 of the Government Code in conjunction with the common law right of privacy.

In conclusion, we have found that some of the submitted information is excepted from disclosure under section 552.103. However, you must release the marked documents with yellow flags under section 552.022(a) but withhold the information protected by section 552.101 and common law privacy.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

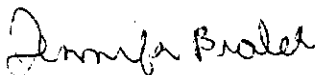
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/nc

Ref: ID# 136261

Encl. Marked documents

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(w/o enclosures)